

U.S. Department of Labor

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Issue Date: 08 December 2005

CASE NO.: 2005-LHC-233

OWCP NO.: 07-170432

IN THE MATTER OF

**HERBERT E. ALBRIGHT,
Claimant**

v.

**INSULATED STRUCTURES, INC.
Employer**

and

**BONAR ENGINEERING & CONSTRUCTION
Employer**

APPEARANCES:

**William S. Vincent, Jr., Esq.
On Behalf of Claimant**

**Christopher Stahulak, Esq.
On Behalf of Employer Insulated Structures**

**William Farrington, Esq.
On behalf of Employer Bonar Engineering & Construction**

**BEFORE: C. RICHARD AVERY
Administrative Law Judge**

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 22 U.S.C. 901 et. Seq. ("the Act"), brought by Herbert Albright ("Claimant") against Insulated Structures, Inc. ("Employer") and Bonar Engineering and Construction ("Bonar"). The formal hearing was conducted in Metairie, Louisiana on June 15, 2005. Each party was represented by counsel, and each presented documentary evidence, examined and cross-examined the witnesses, and made oral and written arguments.¹ The following exhibits were received into evidence: Joint Exhibit 1, Administrative Law Judge Exhibit 1, Claimant's Exhibits 1-18, Employer's Joint Exhibits 1-33 and 35-40, and Interested Party Exhibits 1-18.² This decision is based on the entire record.³

STIPULATIONS

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows (JX 1):

1. The date of the injury/accident was May 1, 2003;
2. The injury was in the course and scope of employment;
3. An employer-employee relationship existed at the time of the accident;
4. Employer was advised of the injury on May 1, 2003;
5. Notices of Controversion were filed on July 12, 2004, August 13, 2004, April 28, 2005, and May 5, 2005;
6. An informal conference was held on October 4, 2004;
7. Nature and Extent of Disability:
 - a. Temporary total disability: May 1, 2003 to disputed;
 - b. Wages in lieu of compensation were paid from May 1, 2003 until August 3, 2003, in an amount of \$9,135;
 - c. No medical benefits have been paid;
8. Permanent disability: right eye, 100%;
9. Date of maximum medical improvement is disputed.

¹ The parties were granted time post-hearing to file briefs. This time was extended up to and through October 28, 2005.

² Employer' Carrier, Everest Insurance, was allowed to participate at the hearing on a limited basis and file a post-hearing brief as an interested party, through its counsel of record, Elizabeth Smyth Sirgo, Esq.. Carrier insures Employer for state worker's compensation.

³ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript pages: Tr. __; Joint Exhibit: JX __; Administrative Law Judge Exhibit: ALJX __ p. __; Claimant's Exhibits: CX __, p. __; Employer's Exhibits: EX __, p. __; and Interested Party Exhibits: IPX __, p. __.

ISSUES

The unresolved issues in this proceeding are:

1. Jurisdiction: whether situs and status requirements of the Act have been satisfied;
2. Claimant's average weekly wage;
3. Nature and extent of Claimant's injuries to his leg, back, head and mental condition;
4. Amount of benefits owed and responsible party;
5. Whether Claimant has reached maximum medical improvement;
6. Claimant's ability to return to work;
7. Whether Claimant was suffered a loss of wage-earning capacity, if any; and
8. Attorney's fees and penalties.

STATEMENT OF THE EVIDENCE

Testimony of Herbert Albright

Claimant is thirty-six years old and has a GED. His first job was in the field of construction, and most of his experience is in general construction, though he does possess some carpentry skills. Tr. 100. Claimant testified that he worked for Retail Planning in February 2000, where he was initially paid eight hundred dollars per week as a carpenter. Subsequently, he was promoted to Field superintendent and was paid nine hundred dollars per week. He continued employment with Retail Planning until 2002. Tr. 101-102.

Claimant had worked for Employer on a previous job in Georgia, where he was paid fifteen dollars per hour. He returned to work for Employer on the New Orleans Cold Storage ("NOCS") project. The facility was located on the Jourdan Street Wharf in New Orleans. Claimant described the job as installing a single-ply rubber roof, which consisted of insulation and a membrane. Tr. 108. Claimant explained that he laid the insulation down in two layers, and staggered the layers. Screws were put in the layers of insulation, then the membrane was rolled out and one side was mechanically fastened. The other layer was then rolled out, and finally, the membrane was heat-weld closed. Claimant testified that he worked on the roof at all times. Tr. 109.

Claimant did not recall what happened when he was injured. He testified that his current problems include a loss of vision in his right eye, loss of sense of smell, headaches, middle neck pain, lower back pain, right hip pain, right leg problems, and nervousness. Tr. 110. He described his headaches as feeling as if he was hit in the head with a sledgehammer. These headaches occur approximately once per week, though Claimant said he also experiences "constant" headaches which are not as bad. When he

gets a bad headache, Claimant will lie down and go to bed; the lesser headaches “ease up” with medication. Tr. 111.

Claimant complained of memory problems, stating if he does not write things down he forgets them. Tr. 112. He described his neck pain as “not constant,” but he usually experiences neck pain when he gets a migraine headache. Claimant said his right arm sometimes shakes so badly that he cannot hold a pencil. Regarding his right leg, Claimant complained of stiffness, shaking, and said he loses his balance. He described his back pain as “kind of like a pinching,” and said it is worse when he gets up and moves around. Tr. 113. Claimant said he experiences constant aching in his knee sometimes accompanied by swelling. He said he is capable of using a riding lawnmower because the clutch and brake are on the left side and he can operate them with his left foot. Tr. 114. Claimant said he usually only gets between two and three hours of sleep per night. During the day, he watches television, talks on the telephone, and will lie down from time to time. Tr. 116. Claimant occasionally drives his wife to work which is two miles from their home. Claimant said he experiences dizziness when he has migraines. He described his dizziness as intermittent, it occurs three or four times per week and lasts between thirty and forty-five minutes. When this occurs, Claimant rests on the couch. Tr. 117.

Since his injury, Claimant has not looked for work because “they would laugh” at him and would not take him because he uses a cane. Tr. 117. Claimant has seen Dr. Umar, a psychiatrist in Kentucky, since March or April of last year, approximately every three months. Claimant takes Paxil which he says has helped with his depression but not with his “agitation.” Tr. 119. Claimant saw Dr. McGregor in New Orleans twice, and recalled seeing Dr. Roniger on May 1, 2005. Claimant said that Dr. McGregor was more thorough in his examination. Claimant recalled meeting with Mr. Ducote, the vocational counselor, but said that Mr. Ducote never contacted him to tell him where to go to look for work. Tr. 122. Claimant recalled receiving a letter from Bonar offering him a position, but he did not know what the position was, and said he never spoke to Bonar. Tr. 123.

On cross-examination, Claimant testified that he has also performed some mechanic work in the past. Tr. 127. He clarified that when he worked for Retail Planning, he earned nine hundred dollars per week but his hours varied, and some years he worked twenty or thirty hours per week, and occasionally he had breaks between jobs. Tr. 128. Claimant recalled that in his deposition, he testified that he was given “a hard time” at Retail Planning and therefore he left voluntarily. He agreed that Retail Planning called him back for another project which he refused. Tr. 129. Claimant said that part of his job duties at Retail Planning was ordering supplies and making work schedules; he agreed that he was perhaps capable of doing those tasks now, depending on the job. Tr. 130.

Claimant elaborated on his first job with Employer, stating that it was in Georgia and consisted of the same work he performed at the NOCS site. He agreed that there was nothing different about the two jobs, aside from the fact that there was a larger area to insulate at NOCS. Tr. 131. Claimant recalled that Mr. Forrest Mitchell, Employer's president, told him about the job in Georgia. Claimant said he had known Mr. Mitchell for twenty years. The job in Georgia was new construction in the middle of a field. Six other employees worked with Claimant on that job, plus additional temporary help. Tr. 132. After the job with Employer in Georgia, Claimant worked on a project for Retail Planning in Augusta, Georgia. He later called Mr. Mitchell to see if Employer had available work, and came to New Orleans in mid-January to work on the NOCS project. Tr. 135.

Claimant recalled that "about the only thing on the wharf" when he arrived was an old shed stripped down to its girders. He said that the job was to do the wall-roof juncture, also put the gutters together but not to install them. Also, he sealed the penetrations as pipes were brought through the roof. Claimant said he supervised one other laborer. Tr. 136. Claimant said when he arrived at the site, there was no cargo in the shed, just construction material. He said that the now-existing office building and mechanical room were not in existence when he initially arrived on the job. Claimant agreed that at the time of his accident, the office building was not in existence. Tr. 137.

Claimant testified that he never worked on the dock area, he never worked on any vessel at the NOCS site or in Georgia, he never loaded or unloaded cargo, operated a crane, or worked on water such as a barge or platform. He agreed that when he arrived at the site, he did not pay attention to where the water began and the land ended, because it was just another insulation project. Tr. 140.

Claimant said around the time of his accident, he was scheduled to be working on the roof of the mechanical building. He had laid the insulation across the roof, but had to cut the insulation out of an opening so Bonar could install a hatch and stairwell. Claimant recalled that he marked out the area with markers of "X" and "HOLE." Claimant agreed that Bonar actually installed the side of insulated paneling on the building, Employer did not. Claimant said that he had performed the same process on the freezer building, and did not see any cargo in the building. To his knowledge, none of the machinery was operational at that time. He recalled seeing one vessel in the area, which sat there for a long time. Tr. 144.

Claimant testified that he spoke with Mr. Mitchell after his accident regarding employment, and recalled that Mr. Mitchell said he would contact Claimant if there was a project big enough to work on. Claimant said he recalled telling Mr. Mitchell that Retail Planning might call him back. Tr. 145. Claimant said he started using a cane after he came off the crutches he was using. He thought that Dr. Craig told him to use the cane, and could not recall any time that he did not use it. Claimant agreed that in his

deposition, he said that his eye doctor told him he could drive so long as he was traveling familiar streets and did not drive on main roads, though Claimant admitted that he attended the deposition at NOCS and drove himself. Tr. 149. Claimant agreed that there may be some kind of work he could do, but said he has difficulty sitting or walking for long periods of time. He thought he could work an eight-hour day if he could sit and stand at will. Tr. 152.

Claimant agreed he had not looked for work since his accident. He said his uncle owns a welding company in Kentucky, and he agreed that in his deposition he said he could work there but would rather do construction work. Claimant said he had not contacted Retail Planning, Bonar, or Mr. Mitchell regarding work. Tr. 154. Claimant acknowledged that prior to his employment with Employer, he had worked all over the country. He also acknowledged that in November 2003, Dr. Reilly said Claimant could return to work in twelve months if he received the correct treatment; Dr. Reilly suggested physical therapy which Claimant did not receive. Claimant said he was denied Social Security Disability twice. Tr. 159.

Claimant clarified that while he worked at the NOCS site, the refrigeration warehouse was not in operation, it was under construction. He said that at the time of his accident, the warehouse facility was “pretty much” completed. Tr. 161-162.

On redirect, Claimant testified that he could not perform the job he had at Retail Planning in his current physical condition because the job required a lot of climbing and because Claimant “has a short fuse.” Tr. 165. He said that he could not perform the planning and making schedules he did at Retail Planning because he would not be able to “go around” to see what was being done and what needed to be done. Tr. 167. Similarly, Claimant did not think he was capable of working for Employer because of the heights involved in the work, Claimant thought he would have a difficult time getting up and down. Tr. 166.

Testimony of Kathy Albright

Mrs. Albright has been married to Claimant for eleven months but met him in April 2002. She said that prior to the accident, she and Claimant lived in Reno, Nevada, where they managed the apartment building in which they lived. They later moved to Kentucky where Claimant’s grandmother lived, then came to New Orleans in mid-January 2003. Tr. 55-56. While in the New Orleans area, they lived at a Motel 8 in Slidell, and stayed there until the third week of June, 2003. Mrs. Albright said that Mr. Mitchell paid their room and board until they left. Tr. 58

Mrs. Albright learned of her husband’s accident on May 1, 2003. She went to Charity Hospital, where Claimant was treated, and said that Claimant remained unconscious for seven or eight days, when he woke up incoherent and disoriented. Tr. 59. Mrs. Albright said Claimant was discharged from Charity on May 21, and they

stayed in New Orleans for another three or three and a half weeks. She said that doctors have denied Claimant medical treatment because he has no funds to pay for them. Mrs. Albright testified that Claimant has had only one visit to an orthopedist in April 2005 because he has neither insurance nor money to pay for treatment. Mrs. Albright works and earns \$6.50 per hour.

Mrs. Albright said that since the accident, Claimant has “periodic spells of confusion,” depression, becomes aggressive easily, and has a bad memory. Tr. 64. She said that usually, Claimant has back pain and headaches every day, that the headaches affect his balance, and since he stopped walking with crutches, “he tilts.” Tr. 65. Mrs. Albright said that Claimant never had a temper with her in the past, but now he does, and that he is frustrated and aggravated, but never violent. Tr. 66. On cross-examination, Mrs. Albright agreed that she and Claimant were not told that they had to leave New Orleans. She said that claimant does not drive a lot. She said that taking Paxil has helped Claimant some. She agreed that Claimant has not looked for work since the accident. Tr. 68-72.

Testimony of Forrest Mitchell

Mr. Mitchell testified that he is Employer’s president. The business is located in Orlando, Florida, in Mr. Mitchell’s house. Employer currently has seven employees; in May 2003 it had six employees. Mr. Mitchell started the business in 1999. Tr. 171. Mr. Mitchell has a partner, Troy Hyrons. Regarding Employer’s assets, Mr. Mitchell testified that Employer owns a couple of pick-up trucks, one flatbed trailer, one enclosed trailer, and some office equipment. Tr. 173.

Mr. Mitchell stated that Employer’s business is building cold storage facilities. Employer averages between forty and fifty projects per year, which range from a couple hundred dollars to \$605,000 for the NOCS project, which was Employer’s biggest job. Tr. 174. Mr. Mitchell said he aims to gross one million dollars per year; if he does so, after taxes, he has between \$30,000 and \$40,000. He said Employer purchases its own supplies and he and Mr. Hyrons each receive salaries of \$35,000. Hector Rivera, an employee, earns between \$35,000 and \$37,000, the other employees are paid between \$25,000 and \$28,000 per year. Tr. 176.

Mr. Mitchell testified that the NOCS project was not a profitable job. He said that Employer currently receives fifty percent of its business from Bonar. Mr. Mitchell said that Claimant was hired for the duration of the NOCS job, provided he was not “called back” by Retail Planning. Claimant was paid hourly. Tr. 178. Mr. Mitchell recalled that Claimant started working with the crew on the freezer building which was an existing structure so it was finished in three or four weeks. Employer then pulled off the job because the loading dock had to be built. Mr. Mitchell said that Claimant was left on-site to make sure penetrations were sealed; he estimated that Claimant worked alone for about one month. Tr. 179-180.

Mr. Mitchell learned of Claimant's accident while speaking on the telephone with Mr. Rivera, the superintendent, who witnessed Claimant's accident as it occurred. Mr. Mitchell immediately drove to the site from Florida and conducted an investigation the following morning. He spoke with Mr. Rivera who said he and Claimant had laid a piece of insulation down and Claimant marked where the hole was under the insulation. Mr. Rivera told Mr. Mitchell that Claimant did everything he was supposed to do and told everyone to stay away from the hole. Claimant then asked Mr. Rivera to get a saw, which Mr. Rivera was doing when Claimant fell. Tr. 181.

Aside from the NOCS job, Employer had never performed any work on a wharf, and Mr. Mitchell said that Employer had never performed work on a vessel or worked on a piece of equipment for a vessel. Tr. 182-183. He said that most of Employer's customers are like Bonar or citrus plants, repairing refrigeration units. Tr. 183. Mr. Mitchell said that Employer had paid Claimant a salary of fifteen dollars per hour for forty hours per week. In addition, Employer paid room and board while Claimant and his wife stayed in the New Orleans area.

Mr. Mitchell testified that he reported Claimant's injury to his insurance carrier. He said that he and Claimant still speak approximately every three weeks to "catch up," and Mr. Mitchell had not noticed any problems with Claimant's memory in these conversations. Tr. 184-185. Mr. Mitchell said that Employer does not currently have a position available, but if it did, it would offer work to Claimant. He said that Claimant was a good employee, a good insulator, and he never had problems with Claimant on the job. Mr. Mitchell recalled that Claimant commented that he could work for his uncle, but he could not make the same money he could in construction. Tr. 186.

Mr. Mitchell explained that Employer does not have \$98,000 available to pay Claimant's medical bills. Employer stopped paying Claimant in August 2003 because all its employees were off the job. He said he tried to get unemployment benefits for Claimant. Tr. 188. Mr. Mitchell said that Employer has no inventory, and currently has three projects in Orlando, worth \$75,000, \$7,500 and \$1,500. Employer has between ten and fifteen outstanding bids, the largest of which is \$800,000, and the total amount is between \$1.2 and \$1.3 million. Employer's current accounts receivable are \$30,000. Employer leases any equipment it needs for each job. Tr. 190.

On cross-examination, Mr. Mitchell said that Claimant was paid the same amount as Mr. Rivera, and agreed that had he completed the NOCS project, he would have made the same salary that he earned for the first nineteen weeks of the project. Tr. 191-192. Mr. Mitchell said that the \$30,000 in accounts receivable is not owed by Bonar, but by four or five other contractors. He agreed that Bonar owes Employer an additional \$30,000 and has owed the amount for two years. Tr. 193. Mr. Mitchell agreed that Employer has not assisted Claimant financially since August 2003 despite knowing Claimant has no income. Tr. 194. He said that Claimant was paid fifteen dollars per

hour, \$22.50 per hour for overtime, fifteen dollars per day for board, and twenty-seven dollars per day for room. Tr. 195. Mr. Mitchell agreed that Employer had to return to New Orleans to complete the office building at NOCS. He said the building was part of the original contract but he did not reinstate Claimant's salary. He estimated it took a week or a week and a half to complete the building. Tr. 197-198. On redirect, Mr. Mitchell said that Employer is not awarded all the projects on which it bids.

Testimony of Henry B. Bonar, II

Mr. Bonar testified that he is an engineering contractor and fifty percent owner of Bonar Engineering, a Florida corporation located in Jacksonville. Bonar specializes in the "niche market" of refrigeration and freezing facilities in the perishable food industry. Tr. 200. Bonar was the general contractor for the NOCS project, and as such, it provided a designated built facility for NOCS at the Jourdan Street Wharf. Mr. Bonar said that the NOCS job was the largest project Bonar had been involved with to date. Tr. 200.

Mr. Bonar explained that NOCS wanted to take over a warehouse at the Jourdan Street facility. NOCS' plan was to receive poultry from local processors and do some exporting; in addition, there was one room that NOCS would lease out to a local vendor. Tr. 204. Bonar designed the facility into a "modern refrigerated facility" no different than any other facility it would design stateside. TR. 205.

Mr. Bonar testified that he learned of Claimant's accident on the day it occurred, and he put Bonar's workers' compensation carrier on notice immediately. Bonar subsequently sent a letter to Claimant, located at Employer's Exhibit 37, which was an offer of employment. Mr. Bonar said that Claimant never contacted Bonar regarding the letter. Tr. 207.

On cross-examination, Mr. Bonar acknowledged that NOCS wished to double its freezer capacity and that the project was currently ongoing. Tr. 211. Mr. Bonar said his understanding of NOCS' operations prior to moving to the Jourdan Street facility was that the operations were not as convenient or sanitary as NOCS wished them to be. Mr. Bonar did not know if NOCS was importing products, and said that all he had ever seen at the Jourdan Street facility was processed products that NOCS froze and either sent to export or sent back to the domestic market. Tr. 212. Mr. Bonar said the building Bonar designed for NOCS worked so well that it apparently put NOCS "about five years ahead of schedule." Mr. Bonar explained that in his field, most of the trades are specialty trades, including insulation, roofing, ammonia refrigeration, and laborers in all of those trades were brought in for the NOCS project. Tr. 214.

Deposition of Lawrence J. Molony, Jr.

Mr. Molony was deposed on May 27, 2005; his deposition is located at Employer's Exhibit 22. Mr. Molony testified that he is the vice president of finance of New Orleans Cold Storage ("NOCS"), and has been employed by NOCS for twenty-three

years. EX 22, p. 30. Mr. Molony explained NOCS' business, stating that its customers are poultry producers, refrigerated frozen food companies, corporations that produce frozen food, and food traders, whom he explained buy from food producers and sell the products to foreign markets, but store the product with NOCS. EX 22, p. 19.

Mr. Molony said that the purpose of the Jourdan Street facility was to provide a facility to freeze and store, for NOCS' customers, frozen poultry or any frozen product that is involved in either being imported or exported by ship or ocean cargo container. EX 22, p. 34. Mr. Molony said that the Port of New Orleans had a large shed on the site, and NOCS wanted to expand due to customer demand. He explained that NOCS was interested in having a warehouse which the ship could pull up to and NOCS could load directly onto the ship. EX 22, p. 35.

Mr. Molony testified that NOCS took over the shed and made leasehold improvements which converted the existing dry shed to a refrigerated warehouse, giving NOCS the capacity to hold products in a frozen condition as well as the ability to blast-freeze large quantities of frozen products. He said that NOCS served the same customer base, just at a greater volume and with greater efficiency. EX 22, p. 35.

Mr. Molony acknowledged that the site had the capacity to offload products from ships into the warehouse, but said at the present time, NOCS only loads ships from the warehouse. He explained the process, stating that the product goes from a truck into NOCS' blast freezers, it is then moved into a storage freezer. When the ship arrives, the ship is loaded with products and exported. EX 22, p. 36. Mr. Molony said that one reason the Jourdan Street location was selected was because it was more efficient to not have to truck the product to the ship; the location cut a leg out of the transportation process. He said that the facility has the capacity to accept frozen goods and load and offload frozen cargo from ships. EX 22, p. 37.

Mr. Molony testified that NOCS has a stevedoring service; and that loading is performed by the stevedoring service that is subcontracted by a wholly owned subsidiary, NOCS Transportation. EX 22, p. 39. He said that NOCS does not lease the wharf from the Port of New Orleans; rather, NOCS uses the wharf on a ship-by-ship basis. He explained that when a ship arrives, it is loaded by the stevedores. The stevedore service collects fees from the customer and pays the Port on a per-ton basis. EX 22, pp. 49-50. Mr. Molony said that the "open wharf" area is the area the stevedores lease from the Port. The stevedores have a building and equipment in the area the Port leases to them.

Regarding a clause in the lease between NOCS and the Port which states that a consideration for the Port entering into the lease with NOCS is that the operations conducted on the leased premises shall contribute to the domestic or foreign waterborne commerce of the Port of New Orleans, Mr. Molony said that it was a standard clause which the Port put in every lease. EX 22, p. 58. Mr. Molony acknowledged that the

lease stated that NOCS guaranteed 100,000 short tons of maritime cargo per lease year through the Jourdan Road facility, saying that the more NOCS shipped the more of a discount it received, and that the clause was an incentive to move cargo. EX 22, pp. 60-62.

Mr. Molony testified that for the construction of the facility, NOCS did not have coverage under the Longshore Act, but did have such coverage for the operations of the facility on an “if any” basis, and its employees were covered under Louisiana workers’ compensation, effective May or June 2003. He explained that NOCS did not carry such coverage during the construction phase because NOCS’ contract with Bonar required Bonar to provide all necessary insurance. EX 22, pp. 63-64.

Mr. Molony elaborated on the wharf area, stating that it is a non-exclusive first-call area, meaning that NOCS does not have exclusive use, and if the Port wanted to bring in a ship that had nothing to do with NOCS and load and unload the ship, the Port could do so. EX 22, p. 66. He said that the mechanical and office buildings were added as part of the construction, but that the entire warehouse area was pre-existing as a dry shed. EX 22, p. 68.

On cross-examination, Mr. Molony explained that NOCS used the steel frame of the pre-existing structure to make a new warehouse. He believed that the existing steel panels were removed and replaced with insulated panels. Mr. Molony did not believe that NOCS was conducting operations on May 1, 2003. EX 22, pp. 81-87.

Mr. Molony explained the process previously used by NOCS before it relocated to the Jourdan Street facility. He said that the subsidiary (NOCS Transport) hired draymen to dray the product to various wharves in New Orleans where ships were loaded. The subsidiary then invoiced the client for transport and loading of product. Mr. Molony said that currently, NOCS does not have to truck product to shipside, but NOCS Transport is still the entity which procures the separate subcontractor to load the vessel. Thus, he explained, the only difference is now there is no trucking operation involved. EX 22, pp. 89-90. Mr. Molony said that NOCS Transport currently subcontracts with S & S Stevedoring Services of America. He said that NOCS has never performed its own stevedoring, and no NOCS employee actually loads cargo; rather, NOCS employees put products at a demarcation line, and NOCS Transport stevedores retrieve the products. He said that stevedores do not enter the NOCS warehouse, but must rely on the product being brought out from the warehouse, they then retrieve it and load it on ships. EX 22, pp. 106-107.

Mr. Molony said that NOCS’ “niche” is the import and export of refrigerated products and warehousing. NOCS operates two other facilities in LaPorte, Texas, and Charleston, South Carolina, neither of which is located on waterways. He said that the

facilities' construction methods are similar: steel frames, insulated panels, and membrane roofs. EX 22, pp.101-102.

Deposition of David A. Wagner

Mr. Wagner was deposed on June 2, 2005; his deposition is found at Employer's Exhibit 23. Mr. Wagner testified that he is the chief operating officer of the Board of Commissioners of the Port of New Orleans ("the Port"). His duties include managing the day-to-day operations of the Port and overseeing 320 employees. Mr. Wagner has held the position since 1989. EX 23, p. 7.

Mr. Wagner said that prior to the construction of the NOCS facility, the Jourdan Street facility was a transit shed and marine terminal for handling breakbulk cargo, such as rubber, steel and plywood. The location was leased to Ceres Gulf Terminals from 1984 until 1996. EX 23, pp. 9-12. Mr. Wagner said that almost all of the cargo that went through the facility between 1996-1997 and 2001-2002 was done under flex-leases to tenants along the Mississippi River. He described the facility as essentially an "overflow area," meaning that if a tenant needed additional space, it may have used the Jourdan Street facility. EX 23, p. 23.

On cross-examination, Mr. Wagner said that while construction was occurring at the site, there would not have been much cargo going through the facility because the shed on the site was not usable, so any cargo going through the facility at that time would have had to go straight to a ship. EX 23, p. 38. Mr. Wagner said that a typical lease between the Port and a tenant involves the Port holding out one hundred feet back from the wharf and retaining that area under the control of the Board of Commissioners of the Port. EX 23, p. 40.

DISCUSSION

Jurisdiction

Section 2(3) (status) and Section 3(a) (situs) set forth the requirements for coverage under the Act. 33 U.S.C. §§ 902(3), 903(a). Status refers to the nature of the work performed, and situs refers to the place of performance. Prior to the enactment of the 1972 amendments, the Act contained only a situs test; recovery was limited to those injured on navigable waters. *Nacirema Operating Co. Inc, v. Johnson*, 396 U.S. 212 (1969). One of the motivations behind the 1972 amendments, however, was the recognition that modern cargo-handling techniques had moved much of the longshoreman's duties off the vessel and onto land. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). Accordingly, the covered situs of Section 3(a) was expanded and the status test was added, extending coverage to "maritime employees," including, but not limited to longshoremen, harbor workers, ship repairmen, shipbuilders, and ship breakers. The Board has consistently held that the Section 20(a) presumption

does not apply to jurisdiction under the Act. *Sedmak v. Perini North River Associates*, 9 BRBS 378 (1978), *aff'd sub nom. Fusco v. Perini North River Associates*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981).

Situs

To be covered under the Act, a claimant must meet both the situs requirement of Section 3(a) and the status requirement of Section 2(3). Section 3(a) states:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a)(1994). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (1980). The Fifth Circuit, in whose jurisdiction this case arises, has adopted a broad view of the situs test, and has declined to restrict the test by fence lines or other such boundaries. *See Sisson v. Davis & Sons, Inc.*, 131 F.3d 555 (5th Cir. 1998).

In this case, the parties do not dispute that the situs requirement is met. Claimant was injured while working on a building on the Jourdan Street Wharf, which is indisputably a covered situs as it is on navigable waters. I agree with the parties that Claimant satisfies the situs requirement requisite for jurisdiction. The parties disagree, however, as to whether Claimant has satisfied the status requirement necessary to confer coverage under the Act.

Status

The Parties' Contentions

Claimant asserts that he was injured while performing work essential to the loading and unloading of vessels. Through counsel, in his brief, Claimant relies on several cases where coverage was found, including *Odom Construction v. US Dep't of Labor*, 622 F.2d 110 (5th Cir. 1980) (finding that a worker who is normally land-based and merely moving blocks to repair a concrete pier was covered under the Act); *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980) (holding that a carpenter who was helping build a pier was covered as a harbor worker because he was aiding in maritime

commerce); and *Gavroncic v. Mobil Mining*, 33 BRBS 1 (1999) (extending coverage to a janitor.) Claimant asserts that Employer's argument is not in line with Fifth Circuit precedent.

Similarly, Carrier (as an interested party) argues that Claimant meets the status requirement, pointing to the testimony of Mr. Bonar which indicated that the point of the construction was to expand to enable NOCS to receive more poultry from domestic suppliers and to facilitate foreign import and export. Carrier also noted the testimony of Mr. Molony, NOCS' representative, which indicated that the purpose of the facility was to provide a facility to freeze and store frozen product which is either imported or exported by ship or ocean cargo container.

In opposition, Employer asserts that Claimant was not engaged in maritime employment at the time of his injury and therefore the Act is not applicable. Employer maintains that Claimant's work as an insulator is not an integral part of the loading or unloading of cargo. Employer points to *Moon v. Tidewater*, 35 BRBS 151 (2001), wherein the Board determined that a carpenter who worked on a dockside warehouse was not engaged in maritime employment and that the warehouse was not a uniquely maritime structure.

Employer concedes that it is well-settled that workers who are engaged in the construction of uniquely maritime structures are covered by the Act, and notes that the cases relied upon by Claimant include such structures as piers, navigational signals and ship cranes. However, the distinguishing factor, according to Employer, is the fact that a warehouse is not inherently maritime and therefore, excludes Claimant from coverage. Employer further points to *Southcombe v. Mark*, 37 BRBS 169 (2003), where the Board held that an ironworker building a yacht facility was not covered by the Act. In sum, Employer asserts that a warehouse is not a pier, wharf, or inherently maritime structure.

Bonar Engineering, the contractor, relies on the same cases cited by Employer and notes that Claimant's reliance on cases where the work was being performed on a uniquely maritime structure is misplaced and those cases are inapplicable to the instant case. Bonar notes that *Moon* stated that work is not maritime in nature simply because it is located near maritime facilities. Bonar stresses that Claimant was injured while working on an equipment storage building for a refrigerated warehouse, which is not a uniquely maritime structure.

DISCUSSION

The effect of the 1972 amendments was to move coverage ashore to provide for amphibious workers; one of the motivations behind the amendments was the recognition that modern cargo-handling techniques had moved much of the longshore workers' duties off of vessels and onto the land. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249

(1977). However, the legislative history reveals that the committee did “not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.” S. REP. No. 1125, 92d Cong., 2d Sess, 13 (1972); H.R. REP. No. 1141, 92d Cong., 2d Sess. 11 (1972); U.S. Code Cong. & Admin. News 1972, 4698, 4708.

Accordingly, an employee is defined as a person engaged in maritime employment, including any longshoreman or other person engaged on longshore operations, and any harbor worker including ship repairman, shipbuilder and shipbreaker. 33 U.S.C. § 902(3). The categories of occupations and activities listed in Section 902(3) are not an exhaustive definition of “maritime employment,” but Supreme Court decisions have left it “clearly decided that, aside from the specified occupations, land-based activity occurring within a Section 3 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel.” *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808 (5th Cir. 1994), cert. denied, 511 U.S. 1086 (1994) (quoting *Chesapeake & Ohio Ry. v. Schwalb*, 493 U.S. 40 (1989)).

In *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977), the Court rejected a “moment of injury” test and held that a claimant need not be engaged in maritime employment at the time of his injury to be covered by the Act. The claimant in that case was a longshoreman by occupation but was not engaged in longshoring activities at the time of his injury. However, the Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arose, has held that a claimant may also satisfy status requirement by fulfilling the “moment of injury” test; that is, by being engaged in maritime employment at the time of injury. *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843 (5th Cir. 1989), cert denied, 493 U.S. 1070 (1990). The Fifth Circuit uses the “moment of injury” test to broaden coverage under the Act. See *McGoey v. Chiquita Brands Int’l*, 30 BRBS 237 (1997); *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989).

The Supreme Court later refined the definition of maritime employment in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), when it clarified that maritime employment encompassed any worker who facilitated in the movement of cargo between land transportation and ship, and vice versa. Finally, the Court expanded the definition of maritime employment when it held that workers who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act, and looked to the determinative factor of whether loading or unloading would come to a halt if the claimant failed to complete his work. *Chesapeake & Ohio Ry. v. Schwalb*, 493 U.S. 40 (1989).

Thus, it is clear that the Act covers those workers injured while actually loading or unloading cargo, maintaining or repairing buildings and machinery essential to the shipbuilding and loading/unloading process. It is also settled that the Act covers those workers injured during the construction of “inherently maritime” structures, such as piers

and dry docks. *Hullinghorst Indus., Inc. v. Carroll*, 650 F.2d 750 (5th Cir. 1981). However, the Act does not extend coverage to “those who are on the situs but not engaged in the overall process of loading and unloading,” because “Congress did not seek to cover all those who breathe salt air.” *Herb’s Welding, Inc. v. Grey*, 470 U.S. 414 (1989). The Supreme Court has also cautioned that it has never “read ‘maritime employment’ to extend so far beyond those actually involved in moving cargo between ship and land transportation.” *Id.* Therefore, the threshold question in the instant case is whether Claimant was engaged in “maritime employment” at the time of his injury.

Employer relies on *Moon*, which, while factually similar to the instant case, was determined pursuant to unique Fourth Circuit precedent. The Fourth Circuit, in *Weyher/Livsey v. Prevetire*, 27 F.3d 985 (4th Cir. 1994), held that the claimant did not satisfy the status requirement where he worked as a carpenter on a warehouse facility which would eventually be used to store spent fuel from submarines and ships. Claimant argued that he was a harbor worker based on his work on a facility that would eventually be used for maritime purposes. The Board held that, pursuant to *Prevetire*, which controlled, that because the facility on which the claimant worked was under construction at the time of his injury and it was not a pier, dry dock or other “uniquely maritime” structure, rather, it was simply a warehouse, and because the claimant had only a temporary connection to the premises, he was not covered by the Act as a harbor worker. While *Moon* bears some factual similarity to the present case, unique Fourth Circuit precedent is not controlling.

Similarly, I do not find that the case law relied upon by Claimant is completely applicable to the facts of the instant case. Claimant points to *Gavranovic* for the proposition that even a janitor may be covered by the Act; however, examination of the case reveals that the status requirement was met because both of the claimants in that case testified that they engaged in maritime work (including operating cranes, loading outbound fertilizer onto barges, and unloading phosphate from incoming barges) despite the fact neither was engaged in maritime activity at the moment of their injuries (one claimant was cleaning product off a railroad hopper car; the other was working as a rail helper and slipped when he crossed the end of the car). The claimants were deemed to have met the status requirement of Section 2(3) because they both loaded and unloaded vessels “at least some of the time.” In the present case, Claimant testified that he never engaged in the loading or unloading process of vessels.

Other cases cited by Claimant stand for the proposition that workers can be covered despite the fact they are not loading or unloading vessels, which is well settled. However, the claimants in such cases were involved in the building, construction or repair of inherently, obvious maritime structures, as opposed to a warehouse which was located on a wharf.

All of the cases cited by Claimant and Carrier are distinguishable from the facts of the instant case. For example, the claimant in *Southcombe* was an ironworker working for an employer who had been subcontracted by a contractor building a marina. The employer was to install the steel, siding, and roof deck for a yacht servicing center and yacht storage buildings. The claimant was injured while he was guiding steel beams off of a forklift, but was deemed not covered by the Act because he was not engaged in maritime employment at the time of his injury. Contrarily, in *Ferguson v. Southern States Cooperative*, the deceased claimant met the status requirement where he was injured while leaving a warehouse roof where he had been cutting a hole to accommodate the boom of a Jepson ship due to unload the following day. There, the claimant was a covered employee because he was directly involved in the construction and alteration of the employer's harbor facility for the purpose of receiving self-unloading ships.

Other Fifth Circuit cases exist which reiterate the importance of the nexus of a claimant's work with the loading and unloading process. *Hullingshorst Industries, Inc. v. Carroll*, 650 F.2d 750 (5th Cir. 1981), involved a claimant who was injured while erecting a scaffolding, the sole purpose of which was to provide a place for employees to stand while repairing a turntable used to load and unload ships. The court found the status requirement met, for though he was not actually carrying out the tasks of loading and unloading ships, he was "directly involved" in such work. In *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980), the court noted that the fact that the claimant usually worked land-based construction did not defeat his covered status, because the claimant worked building a large pier in the Port of Beaumont. Finally, in *Mungia*, supra, the court determined that the claimant, a "pumper-gauger" who serviced oil wells and worked as a roustabout, was not covered by the Act, for his work had nothing to do with the loading and unloading process, nor was there any evidence that he was ever employed in the maintenance of equipment used in such tasks.

Obviously, Mr. Albright does not neatly fall into any of the cases cited by the parties. Claimant relies on cases which clearly illustrate that the work being performed was of an "inherently maritime" nature, such as on a pier or directly related to shipbuilding, where the work he performed was not; and Employer's reliance solely on Fourth Circuit cases is somewhat misplaced, though they may be more factually applicable. The real issue at hand is whether Claimant's work was maritime in nature. It is undisputed that the work was performed on a maritime situs, which may cloud the issue, but the fact remains that it is the nature of Claimant's work and its nexus to the loading and unloading process which confers status, not the situs on which it was performed. As previously noted, status involves the nature of the Claimant's work whereas situs regards the location in which it is performed. By arguing that Claimant's work was essential to the loading and unloading of vessels, Claimant and Carrier both stress that the building on which Claimant worked would house machinery for the freezer, used to freeze and store product for shipment. However, this argument places the

importance on the location of the work Claimant performed, not on the nature of his work, which was to install roof insulation and seal junctures.

It is not merely the claimant's occupation that confers status, but the connection of the work to the loading and unloading process, a nexus which must be present for the status requirement to be met. In the instant case, Claimant was injured while insulating the roof of a building that housed machinery for a cold storage unit. Claimant testified that he never engaged in any activities related to the loading or unloading of cargo. Mr. Molony, who testified as the representative of NOCS, explained the process used at the facility, stating that the product was frozen and stored in the warehouse, and NOCS employees then placed the frozen product at a location outside the warehouse where subcontracted stevedores took the product and loaded it onto ships. Claimant's work was perhaps integral to the storage process, but not the loading and unloading process. Employer was subcontracted only to "provide and install the single ply roof membrane" for the freezer building, the loading dock, and the battery/machine room, as well as to seal the "wall/roof juncture" with urethane foam. EX 17.

The work Claimant performed had no connection to the process of loading and unloading cargo, nor did he work on equipment essential to such process. This is not a situation where Claimant worked on a crane, or turntable, or anything related to a ship or cargo. Nor was he engaged in the construction of an actual wharf, pier, or ship. Claimant's work was relegated to the roof of a building used in the storage of products, and was far removed from traditional LHWCA activities. In sum, I find that Claimant was severely injured while working on a covered situs, but he was not engaged in maritime employment. Therefore, Claimant's connection to cargo was too tenuous because Claimant's work had no relation to the loading and unloading process, and he does not meet the status requirement of the Act. I do not dispute the gravity of Claimant's injuries, but the appropriate forum for compensation of those injuries is the state workers' compensation tribunal.⁴

ORDER

Claimant's claim for benefits under the Act is **DENIED** for lack of jurisdiction.

So ORDERED this 8th day of December, 2005, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

⁴ Because I find that Claimant does not meet the status requirement necessary to confer coverage under the Act, the issues of nature and extent of Claimant's injuries are moot.

